

calling until later in the morning.<sup>766</sup> Some suggest the calling times should parallel local noise ordinances.<sup>767</sup> EPIC advocated allowing consumers to specify the hours they wish to receive calls.<sup>768</sup>

210. The Commission declines to revise the restrictions on calling times. Instead, we retain the current calling times, which are consistent with the FTC's rules.<sup>769</sup> We believe the current calling times strike the appropriate balance between protecting consumer privacy and not unduly burdening industry in their efforts to conduct legitimate telemarketing. We also believe that Commission rules that diverge from the FTC's calling restrictions will lead to confusion for consumers. Moreover, consumers who want to block unwanted calls during certain times will now have the option of placing their telephone numbers on the national do-not-call registry. They will have the additional option of giving express verifiable authorization to only those companies they wish to hear from. The Commission declines at this time to require companies to adhere to consumers' calling preferences, including "acceptable" calling times.<sup>770</sup> We believe that the costs of monitoring calling times for individual consumers could be substantial for many companies, particularly small businesses. The Commission may revisit this option in the future.

## XVII. ENFORCEMENT PRIORITIES

211. TCPA enforcement has been a Commission priority over the past several years,<sup>771</sup> and we intend that it remain so. In guiding our future enforcement plans, we recognize that the FTC's recent rule changes expand that agency's regulation of telemarketing activities and require coordination to ensure consistent and non-redundant federal enforcement in this area. Most notably, the FTC's adoption of a nationwide do-not-call registry, the related Do-Not-Call Act, and finally our adoption here of requirements that maximize consistency with those adopted by the FTC create an overlap in federal regulations governing major telemarketing activities.<sup>772</sup> We hereby direct Commission staff to negotiate with FTC staff a Memorandum of Understanding between the respective staffs to achieve an efficient and effective enforcement strategy that will promote compliance with federal telemarketing regulations, consistent with the guidelines set forth below.

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<sup>766</sup> J. Melville Capps Comments; Mandy Burkart Comments; Jeff Bryson Comments; John Shaw Comments at 7 (due to the number of nighttime workers, time of day restrictions should begin at 9 am).

<sup>767</sup> PUC of Ohio Comments at 22-23; James Wood Comments.

<sup>768</sup> EPIC Comments at 13.

<sup>769</sup> See 16 C.F.R. § 310.4(c); *see also* FTC Further Comments at 47-50 (stating that the FCC should retain its existing calling time restrictions and maintain the consistency that both agencies have sought on this issue).

<sup>770</sup> The Commission encourages any seller or telemarketer to comply with consumers' requests not to be called during certain times of the day.

<sup>771</sup> See <[http://www.fcc.gov/eb/News\\_Releases/DOC-230145A1.html](http://www.fcc.gov/eb/News_Releases/DOC-230145A1.html)>.

<sup>772</sup> There are other overlapping regulations such as provisions governing abandoned calls, transmission of caller ID, and time-of-day restrictions. *See supra* paras. 146-159, 173-184, 208-210.

212. The FCC's jurisdiction over telemarketing is significantly broader than the FTC's. First, as noted above, the FTC does not have authority over telemarketing calls made by in-house employees of common carriers, banks, credit unions, savings and loans, insurance companies, and airlines. In addition, the FTC's telemarketing rules pertain only to interstate transmissions. In contrast, the FCC's telemarketing rules apply without exception to any entity engaged in any of the telemarketing activities targeted by the TCPA and the Commission's related rules, including those that involve purely intrastate activities.<sup>773</sup> Given the substantial gaps in the FTC's authority over the full range of telemarketing activities, we contemplate that our enforcement staff will focus particularly on those activities and entities that fall outside the FTC's reach – airlines, banks, credit unions, savings and loans, insurance companies, and common carriers, as well as intrastate transmissions by any entity.

213. Nevertheless, we do not contemplate Commission enforcement that targets only those activities, entities, or transmissions that are outside the FTC's jurisdiction. The TCPA creates a statutory expectation for FCC enforcement in the telemarketing area.<sup>774</sup> Moreover, the TCPA's detailed standards pertaining to do-not-call matters evince Congressional intent that the FCC assume a prominent role in federal regulation of this aspect of telemarketing, a mandate that is not altered by the Do-Not-Call Act. Accordingly, even with the FTC's new do-not-call regulations, including its administration of a national do-not-call registry, we emphasize that the Commission must stand ready to enforce each of our telemarketing rules in appropriate cases. For reasons of efficiency and fairness, our staff will work closely with the FTC to avoid unnecessarily duplicative enforcement actions.

214. In determining enforcement priorities under the new telemarketing rules, we contemplate that the Enforcement Bureau will continue its policy of reviewing FCC and FTC consumer complaint data and conferring with appropriate state and federal agencies to detect both egregious violations and patterns of violations, and will act accordingly.<sup>775</sup> The Enforcement Bureau has in place effective procedures to review aggregate complaint information to determine the general areas that merit enforcement actions, and to identify both particular violators and the individual consumers who may be able to assist the staff in pursuing enforcement actions against such violators.<sup>776</sup> Enforcement action could include, for example, forfeiture proceedings under section 503(b),<sup>777</sup> cease and desist proceedings under section 312(c),

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<sup>773</sup> 47 U.S.C. § 152(b). *See supra* paras. 9 and 16.

<sup>774</sup> *See* 47 U.S.C. § 227(f)(3), (7).

<sup>775</sup> Review of the FTC do-not-call database will be particularly important so that our enforcement staff can easily determine the date of any do-not-call request and the date that a company last downloaded information from the database.

<sup>776</sup> In the course of its investigations, the Enforcement Bureau will follow up with individual complainants as appropriate. In light of the state court private right of action under the TCPA and the fact that many TCPA complaints are not against common carriers, consistent with existing practice, the staff will not necessarily contact each individual TCPA complainant. Compare 47 U.S.C. § 208.

<sup>777</sup> Before initiating a forfeiture proceeding against most entities that do not hold an FCC authorization, the violator must have received a Commission citation and then engaged in an additional violation. 47 U.S.C. § 503(b)(5).

injunctions under section 401, and revocation of common carrier section 214 operating authority.

## XVIII. OTHER ISSUES

### A. Access to TCPA Inquiries and Complaints

215. The Commission stated that the 2002 Notice was “prompted, in part, by the increasing number and variety of inquiries and complaints involving our rules on telemarketing and unsolicited fax advertisements.”<sup>778</sup> A few commenters maintain that the Commission should not consider final rules until parties have had an opportunity to analyze the consumer complaints referenced in the 2002 Notice.<sup>779</sup> Other commenters contend that the number of complaints received by the Commission does not necessarily demonstrate a problem that demands government intervention.<sup>780</sup> The ATA filed a Freedom of Information Act (FOIA) request with the Commission on October 16, 2002, seeking access to the TCPA-related informal complaints.<sup>781</sup> The FOIA generally provides that any person has a right to obtain access to federal agency records, subject to enumerated exemptions from disclosure.<sup>782</sup> The FOIA requirements do not apply to records that contain “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”<sup>783</sup> Many of the complaints sought by the ATA contain personal private information. In addition, the complaints are part of a system of records subject to the Privacy Act.<sup>784</sup> For these reasons, the Commission agreed to release the complaints on a rolling basis only after personal information was redacted.<sup>785</sup> In response to ATA’s FOIA request, the Commission has thus far provided

<sup>778</sup> See 2002 Notice, 17 FCC Rcd at 17466, para. 8.

<sup>779</sup> See, e.g., ATA Comments at 41-43 (stating that “[a]s a general matter, access to the [complaints] is necessary to ensure that ‘interested parties have a meaningful opportunity to participate . . . and that the Court has an adequate record from which to determine whether the agency properly performed its functions.’”); MBNA Comments at 10 (requesting “an opportunity to review the complaints to determine the nature of the specific practices complained of, and the extent to which such practices reasonably require new TCPA rules . . .”).

<sup>780</sup> See, e.g., ABM Comments at 7; SBC Comments at 7-8, 17; BellSouth Comments at 4.

<sup>781</sup> The ATA’s FOIA request was for copies of the over 11,000 complaints about telemarketing practices received during the period January 2000 through December 2001. The request also asked for copies of all similar complaints about telemarketing practices the FCC has received since January 1, 2002; copies of the over 1,500 inquiries about predictive dialing received from June 2000 to December 2001; and any non-publicly released FCC responses to the above-referenced complaints. See *Motion For Extension of Time* filed by the ATA, CG Docket No. 02-278, Tab 1, Electronic FOIA Request from Ronnie London. On November 14, 2002, following a meeting with the ATA regarding its FOIA request, CGB confirmed in a letter to ATA counsel that it would take a number of months and considerable staff resources in order to provide the over 11,000 documents covered by the request. See Letter from K. Dane Snowden, FCC, to Ronnie London, Counsel to ATA, November 14, 2002.

<sup>782</sup> See 5 U.S.C. § 552.

<sup>783</sup> 5 U.S.C. § 552(b)(6); see also 47 C.F.R. §§ 0.441 *et seq.*

<sup>784</sup> 5 U.S.C. § 552(a); 47 C.F.R. §§ 0.551 *et seq.*

<sup>785</sup> We explained that informal complaints often contain personally identifiable information such as addresses, phone numbers, social security numbers, and personal financial information. The ATA subsequently filed an (continued....)

approximately 2,420 redacted complaints.<sup>786</sup>

216. We agree with commenters that the increasing number of inquiries and complaints about telemarketing practices should not form the basis upon which we revise or adopt new rules under the TCPA.<sup>787</sup> Rather, such information can be considered in determining whether to seek comment on the effectiveness of any of its rules.<sup>788</sup> We note that, even in the absence of any such complaints, the Commission is required by the Do-Not-Call Act to complete the TCPA rulemaking commenced last year. We disagree with commenters who suggest that parties must have access to all of the complaints referenced in the NPRM in order to be able to have a meaningful opportunity to participate in this proceeding.<sup>789</sup> It is not the existence of the complaints, or the number of complaints, that led the Commission to institute this proceeding to consider revision of its TCPA rules. Rather, our TCPA rules have been in place for more than ten years. We opened this proceeding to determine “whether the Commission’s rules need to be revised in order to more effectively carry out Congress’s directives in the TCPA.”<sup>790</sup> In any event, since September 2002, consumers, industry, and state governments have filed over 6,000 comments in this proceeding, during which time the Commission extended the comment periods twice and released a *Further Notice* in order to ensure that parties had ample opportunity to comment on possible FCC action. The substantial record compiled in this proceeding, along

(Continued from previous page)

*Application for Review of the Freedom of Information Action*, requesting that the Commission “overturn the staff’s classification of the telemarketing complaints and predictive dialing inquiries as ‘not routinely available’ documents” and immediately release them for public consideration. See *Review of Freedom of Information Action* filed by the ATA at 5, CG Docket No. 02-278, December 6, 2002. (In the alternative, ATA requested that “the Commission require the staff to significantly accelerate its release of the redacted documents in time for consideration of them in the notice and comment period, and to substantially reduce or waive the charge associated with producing the requested documents.”) On December 23, 2002, the ATA filed a *Motion for Expedited Review of its Application for Review of the Freedom of Information Act Action* to “ensure that ATA and other parties participating in the . . . proceeding are afforded timely access to critical documents central to the issues raised. . . by the [2002 Notice].” See *Motion for Expedited Review* at 1.

<sup>786</sup> As directed by the ATA, the Commission stopped processing the FOIA on January 27, 2003. The comment period in this proceeding was subsequently extended following the release of a *Further Notice*, and the ATA wrote to the Commission asking that the FOIA processing continue. However, the ATA did not represent that it would pay the additional FOIA fees that would accrue from the processing, and CGB wrote to the ATA for further directions. The ATA then paid for complaint records provided through January 27, 2003, and asked the Commission to continue processing the request. CGB has provided the ATA with a total of 2,420 redacted complaints thus far.

<sup>787</sup> See, e.g., ATA Comments at 36 (noting that “the Commission’s tally of complaints, inquiries and website visits fails to demonstrate a significant problem . . . the existence of a complaint does not amount to a violation of the rules.”)

<sup>788</sup> Other considerations included: the Commission’s own enforcement experience; the amount of time that had passed since the Commission undertook a broad review of the TCPA rules, during which time telemarketing practices have changed significantly; and the actions by the FTC to consider changes to its telemarketing rules, including the establishment of a national do-not-call registry. See *2002 Notice*, 17 FCC Rcd at 17464-68, para. 7-11.

<sup>789</sup> See, e.g., ATA Comments at 41.

<sup>790</sup> *2002 Notice*, 17 FCC Rcd at 17461, para. 1.

with the Commission's own enforcement experience, provides the basis for the actions we take here today.

**B. Reports to Congress**

217. The Do-Not-Call Act requires the Commission to transmit reports to Congress within 45 days after the promulgation of final rules in this proceeding, and annually thereafter.<sup>791</sup> By this Order, the Commission delegates its authority to the Chief, Consumer & Governmental Affairs Bureau, to issue all such reports.

**XIX. PROCEDURAL ISSUES**

**A. Regulatory Flexibility Act Analysis**

218. Pursuant to the Regulatory Flexibility Act of 1980, as amended,<sup>792</sup> the Commission's Final Regulatory Flexibility Analysis in this Order is attached as Appendix B.

**B. Paperwork Reduction Act Analysis**

219. This Order contains modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under § 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collections contained in this proceeding.

**C. Late-Filed Comments**

220. We note that there were comments filed late in this proceeding. In the interest of having as complete and accurate a record as possible, we will accept late-filed comments and waive the requirements of 47 C.F.R. § 1.46(b).

**D. Materials in Accessible Formats**

221. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY). This *Report and Order* can also be downloaded in Text and ASCII formats at: <http://www.fcc.gov/cgb/policy/telemarketing.html>.

**XX. ORDERING CLAUSES**

222. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1-4, 222, 227, and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 222 and 227; and 47 C.F.R. § 64.1200 of the Commission's rules, and the Do-Not-

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<sup>791</sup> See Do-Not-Call Act, Sec. 4.

<sup>792</sup> See 5 U.S.C. § 604.

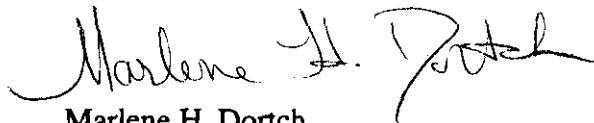
Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557, the Report and Order in CG Docket No. 02-278 IS ADOPTED, and Parts 64 and 68 of the Commission's rules, 47 C.F.R. Parts 64.1200, 64.1601, and 68.318, are amended as set forth in Appendix A. The requirements of this Report and Order shall become effective 30 days after publication of a summary thereof in the Federal Register, with the following exceptions. As discussed herein, the national do-not-call rules at 47 C.F.R. § 64.1200(c)(2) will go into effect on October 1, 2003; the call abandonment rules at 47 C.F.R. §§ 64.1200(a)(5) and (6) will become effective on October 1, 2003; and the caller ID requirements at 47 C.F.R. § 64.1601(e) will go into effect on January 29, 2004. The amendments to the rules in § 64.1200 that contain information collection requirements under the PRA are not effective until approved by OMB. The Commission will publish a document in the Federal Register announcing the effective date of these rules.

223. IT IS FURTHER ORDERED that the comments addressing the applicability of the informal complaint rules to telemarketers ARE INCORPORATED into CI Docket 02-32.

224. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau shall have authority to issue any reports to Congress as required by the Do-Not-Call Implementation Act.

225. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary